United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-2050

To be argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. GEORGE FOYE,

Petitioner-Appellant,

-against-

J.E. LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York,

Respondent-Appellee.

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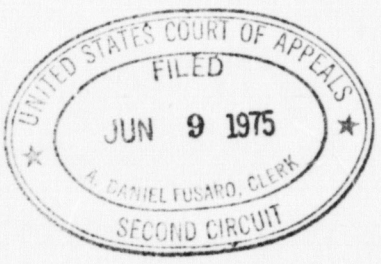
[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7590

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

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DOCKET NO. 75-2050

[APPEAL FROM THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

1. Does petitioner raise a claim cognizable in federal habeas corpus when the undisclosed police report contains no information which is favorable and material to him?

Preliminary Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Foley, J.), dated February 4, 1975, which denied petitioner's application for a writ of habeas corpus. Reconsideration of the petition, which had been previously denied by the same District Court, was mandated by this Court's remand. United States ex rel. George Foye v. LaVallee, 499 F. 2d 1242 (2d Cir. 1974). The District Court granted petitioner a certificate of probable cause.

The issue raised on remand and on this appeal is whether the nondisclosure of certain State Police reports violated petitioner's rights under Brady v. Maryland, 373 U. S. 83 (1963), so as to raise a constitutional issue cognizable in a federal habeas corpus proceeding.

Statement of the Case

Petitioner is presently confined in Clinton Correctional Facility, Dannemora, New York, pursuant to a judgment of conviction rendered by the County Court, Sullivan

County, after a trial by jury. Petitioner was convicted of the crime of murder* and sentenced to an indeterminate term of imprisonment of fifteen years to life on July 12, 1972 (Newburg, J.).

The judgment of conviction was affirmed without opinion by the Appellate Division, Third Department (41 A D 2d 902 [1973]) and leave to appeal to Court of Appeals was denied by that Court on June 12, 1973 (Breitel, J.).

A. Facts

Petitioner and Delois Harden, the woman with whom he was living, were arrested and charged with murder of Ms. Harden's infant son Michael. Petitioner had had two illegitimate children with Ms. Harden but had not fathered the dead infant, who was four years old at the time of death.

*N.Y. Penal Law § 125.25(2):

"A person is guilty of murder when:

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

Under a 1974 amendment to the Penal Law, this now constitutes murder in the second degree. L.1974, c.367, § 4.

On October 24, 1971 the infant was brought to a local hospital emergency room in such serious condition that he was transferred to New York City hospitals. He was diagnosed by the medical personnel as a "battered child," suffering from malnutrition, multiple contusions, marked debilitation, convulsions, and in a comatose state. Michael never regained consciousness and died on January 7, 1972. An autopsy was performed and the coroner stated that the child died as a residual effect of repeated, persistent blunt head trauma over a two year period. The results of the trauma, plus starvation, resulted in terminal hispostatic pneumonia.

Petitioner and Ms. Harden were indicted for conduct including beatings, starvation, and other inhuma treatment which evinced a depraved indifference to human life and recklessly created a grave risk of death to Michael, thereby causing his death. Ms. Harden pleaded guilty to the crime of assault in the first degree before petitioner's trial.

Ms. Harden testified at great length and in great detail as to petitioner's acts toward Michael. Petitioner persistently and without justification punched, kicked, threw, struck, beat with a belt and knocked the child. This usually

occurred when petitioner was drunk or claimed Michael wouldn't obey him. Petitioner also took food away from the child. Ms. Harden admitted that she sometimes disciplined Michael by hitting him across the buttocks with a belt, but not so hard as to leave marks; she refused to characterize this as "beating" Michael. She never punched him or hit him in the head and had seen only one person do this, petitioner (29-209).*

Ms. Harden's testimony was corroborated by other witnesses who had seen petitioner abuse Michael. Gloria Jones, who lived in the same apartment building, saw petitioner kick Michael, slap him with a belt, and punch him, as well as take food away from him (318-362). Leo Parham, who visited Ms. Harden's apartment on several occasions, observed Michael with a swollen face and two black eyes and also saw petitioner punch the infant on the head and throw him across the room where he struck his head on a window sill (364-392). Pat Mannion, who lived in the apartment building, heard petitioner trying to teach Michael to curse, then the sounds like a belt, and then Michael's whimpering (431-458). Clarence Williams, who lived in

*Unless otherwise indicated, number in parentheses refer to pages of the trial transcript. The transcript is not part of the record on appeal but is available to this Court upon request.

the building, saw petitioner hit Michael with his hands and a belt (359-472).

Various medical personnel testified to Michael's physical condition, to the treatment he received, and to the cause of death.

Clayton Brown, an investigator with the State Police testified to his interview with petitioner on the day Michael was brought to the hospital. Petitioner was asked what accounted for the old bruises on the child's body. He stated that he had disciplined Michael with his hands and a belt because the child did not obey him. Delois Harden had told Mr. Brown, in relation to Michael's old bruises, that she had beat him with her hand and belt because of his toilet habits. On cross examination Mr. Brown stated that he was in charge of the investigation into Michael Harden's death; that he made notes and prepared a report which was submitted to his superiors; and that he had recently reviewed the report. Petitioner's counsel requested production of the Brain report for his use. At the Court's direction, the prosecution gave counsel only those portions of the report material to Mr. Brown's direct testimony (393-430).

Petitioner took the stand in his own behalf and stated that he had disciplined Michael with the palm of his hand on the child's buttocks and sometimes with a belt across the back, which left marks. He denied hitting the child with his hands or a belt on any other part of his body; throwing Michael across a room; kicking him, taking food away from him, or teaching him to curse. Petitioner stated that he disciplined the child only because he defecated and urinated on himself. Petitioner testified that Michael had no bruises or contusions on his face or body when he was brought to the hospital*(570-609).

A neighbor of petitioner's (John Whitaker) testified that he visited petitioner three or four times in the last year and never saw him strike or do anything else to Michael and that he had not heard anything in the community which would impugn his character (554-566). John Manzi, petitioner's employer, testified that he was not familiar with petitioner with regard to his reputation for peacefulness, truth, or veracity, but had not heard anything bad (610-612).

*This statement seriously undermined petitioner's credibility since the admitting nurse and doctor's admitting report stated that Michael's whole body was covered with bruises and contusions, arms and legs, head and face (214 - 216, 232-234, 238).

B. First District Court Proceeding

After his state appeal, petitioner brought a federal habeas corpus application, claiming that his constitutional rights were violated by the trial court's refusal to give him the report prepared by State Police Investigator Brown. The District Court denied the application on January 4, 1974, holding that the trial court's action was in the nature of an evidentiary ruling which could not be the basis for a collateral attack by federal habeas corpus.* Petitioner's claim had been exhausted on his state appeal.

C. First Federal Appeal

On appeal, this Court remanded the case to the District Court for further proceedings. United States ex rel. Foye v. LaVallee, 499 F. 2d 1242 (1974). This Court stated that a prejudicial nondisclosure is cognizable in habeas corpus. Since the District Court had never seen a complete copy of the Brown report, it was impossible to conclude that petitioner had not raised a cognizable constitutional issue. Accordingly, this Court ordered a remand so that the District Court could examine the report and determine if the prosecution h[illegible] failed to disclose evidence vital to the defense. See Brady v. Maryland, 373 U. S. 83 (1963).

*Other claims made by petitioner were also rejected and they were not pursued on appeal.

D. Second District Court Proceeding

A limited hearing was held in the District Court before Judge Foley on September 4, 1974. A State Police report (A. 93-124)* was produced and the Court ordered it turned over to petitioner's counsel. A portion of the report or further report (A. 132-141) was missing and ordered produced for the Court and petitioner's counsel. All counsel were then given an opportunity to file briefs on whether or not the material contained in the reports was exculpatory.

Petitioner's brief argued that five sections of the reports contained exculpatory evidence. These are the same five sections argued to this Court on appeal. The District Court examined each of these contentions and held that the undisclosed material "would in no event have changed the verdict, and it is very doubtful to my mind any of it would have been useful to the defense."

* Numbers in parentheses preceded by the letter "A" refer to the appendix submitted by petitioner.

ARGUMENT

SINCE NO INFORMATION IN THE POLICE REPORTS IS FAVORABLE AND MATERIAL TO PETITIONER, THERE WAS NO PREJUDICIAL NONDISCLOSURE AND PETITIONER FAILS TO STATE A CLAIM COGNIZABLE IN FEDERAL HABEAS CORPUS.

This Court remanded this proceeding to the District Court to determine if the undisclosed state police reports contained evidence vital to the defense. Petitioner urged below, as he does to this Court, that five sections of the report contain exculpatory evidence. An examination of the relevant law and each of these sections reveals that the District Court was clearly correct in rejecting this claim.

It is, of course, well settled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Keogh, 391 F. 2d 138, 147 (2d Cir. 1968). Recently discussing the holding of Brady, the Supreme Court delineated its key elements as "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

Accordingly, each section of the reports urged by petitioner must be examined to determine if it is both favorable and material.*

Petitioner first urges to this Court two sections of the report which border on the insignificant, as the District Court stated (A. 129). Eva Roberts (A.99) stated that she had once visited the Harden-Foye apartment and had been denied admittance. The report does not indicate who refused her admittance nor why. The suggestion that this statement is even favorable to petitioner, let alone material on the issue of his guilt or innocense, is frivolous. Moreover, Ms. Roberts did not

* Petitioner's discussion of federal law, primarily Jencks v. United States, 353 U.S. 657 (1957), is obviously inapposite since the ruling is not applicable to state prosecutions. See Palermo v. United States, 360 U.S. 343, 345 (1959). Similarly, claimed violations of state law are irrelevant. This Court has already indicated that the only issue herein is whether petitioner's federal constitutional rights have been violated. 499 F. 2d at 1243-44. See United States ex rel. Butler v. Schubin, 376 F. Supp. 1241, 1247 (S.D.N.Y. 1974), affd. 508 F. 2d 837 (2d Cir. 1975).

testify at trial, nor could she have been called by petitioner, since she had said nothing probative on the issue of the child's treatment during the relevant period.

Petitioner also points to a section of the report in which Clarance Williams stated that he had once seen Ms. Harden refuse to give Michael a cookie and water. Even assuming arguendo that this statement is in any way favorable to petitioner's defense*, it is obviously not material. Mr. Williams testified at trial and was thoroughly cross-examined. He stated with certainty

* Petitioner now alleges that his "main" defense was that the acts causing Michael's death were committed by Ms. Harden, not him. In his opening at trial, however, petitioner's counsel clearly spelled out justification as another defense, admitting that petitioner disciplined Michael but claiming that he acted in the role of a parent, believing the discipline necessary (25-27). Petitioner's direct testimony at trial revealed his reasons for disciplining Michael, supporting the justification theory (e.g. 576-579).

that he had seen petitioner hit Michael with a belt and his hands. He also stated that he once saw Ms. Harden take some food out of the garbage and give it to Michael. Accordingly, it can hardly be argued that he was trying to conceal his knowledge of Ms. Harden's treatment of Michael. In light of all the evidence against petitioner, the fact that Mr. Williams neglected to testify that Ms. Harden had once denied the child a cookie and water fades to absurdity.

Petitioner also claims the statements of Pat Mannion, who testified at trial and was thoroughly cross-examined, contain examples of abuse by Ms. Harden. Pat Mannion's statements appear in petitioner's appendix at 102 and 117, and there is not one word in either of them concerning Ms. Harden's treatment of Michael.

Petitioner further complains that he was not provided with the section of the report in which Delois Harden admitted disciplining Michael with a belt over a period of time (A. 135). The usefulness of this information at trial is not apparent. Ms. Harden was the main prosecution witness and she was thoroughly cross-examined. See, e.g., United States ex rel. Fein v. Deegan, 410 F. 2d 13, 18 (2d Cir.), cert. den. 395 U.S. 935 (1969); United States ex rel. Butler v. Schubin, supra,

at 1248. She admitted at trial hitting Michael with a belt over a period of time, and her admissions at the time of her plea to assault were also before the jury. Accordingly, this section of the report would have brought nothing to the jury's attention of which they were not already aware. The fatal flaw throughout petitioner's argument is his failure to recognize that Ms. Harden's criminal responsibility for mistreatment of Michael does not exculpate him.

Finally, petitioner points to an interview with Ms. Harden's mother, Lorraine Harden, who was not called as a witness (A. 136-137). Lorraine Harden stated that she had once seen her daughter beat Michael. As noted above, Delois Harden admitted to hitting Michael; Lorraine Harden's testimony would have been merely cumulative. Moreover, this same statement contains devastating evidence against petitioner (A. 136); it is obvious that Lorraine Harden's testimony would have been harmful, not helpful, to petitioner.

It seems unlikely that this Court has or will ever be presented with a more frivolous Brady claim. Not one section of the report urged upon this Court is both favorable and material to petitioner' defense. The suggestion that these sections are "vital" "crucial" and "exculpatory" is clearly

lacking in any merit whatsoever. Compare, e.g., United States v. Seijo, ___ F. 2d ___ (Slip Opin. 3039, 2d Cir. April 23, 1975); Clay v. Black, 479 F. 2d 319 (6th Cir. 1973); United States ex rel. Meers v. Wilkins, 326 F. 2d 135 (2d Cir. 1964).

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S HABEAS CORPUS APPLICATION SHOULD BE AFFIRMED.

Dated: New York, New York
June 9, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARILYN LISI , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 9th day of June , 1975, she served the annexed upon the following named person :

Michael Davidoff, Esq.
270 Broadway
Box 329
Monticello, New York 12701

Attorney in the within entitled proceeding by depositing three copies a true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Marilyn Lisi

Sworn to before me this
9th day of June , 1975

Margery Evans Reifler
Assistant Attorney General
of the State of New York